ICG Telecom Group, Inc.
September 25, 1998
CC Docket No. 98-147

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket 98-147

COMMENTS OF ICG TELECOM GROUP, INC.

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SUMMARY

In the order portion of the Notice, the Commission concludes that ILECs are subject to Section 251 of the Communications Act in their provision of advanced telecommunications services. ICG applauds this result. Section 251 was intended to open the local market to competition by ensuring that new entrants would have access to the incumbents' networks. As ever-increasing amounts of traffic are moved from the circuit-switched voice network to packet-switched data networks, it would render Section 251 meaningless if it were read to include only conventional voice telephony.

In the Notice portion of the item, however, the Commission proposes to allow the ILECs to offer advanced telecommunications services through separate, nonregulated affiliates that would *not* be subject to Section 251. ICG believes that the Commission's reading of Section 251 is beyond its legal authority. If Section 251 means what it says, the ILECs cannot escape their obligations thereunder by a shuffling of corporate entities.

The Commission's proposal will eviscerate the correct policy result reached in the order portion of the Notice by creating a vehicle for the ILECs to make an end run around Section 251. ICG is very concerned that the Commission's proposal will allow the ILECs to divert facilities and service offerings to their advanced services affiliates. As the ILECs shift as much of their operations as possible to their advanced services affiliates in order to escape regulation, the ILECs will become empty shells, whose obligation under Section 251 to make their facilities available to competitors is meaningless. In addition, under the Commission's proposal, the ILEC and its affiliate can work in concert to ward off competition.

The Commission should adopt national standards for collocation for all services. The standards should reflect a fundamental re-thinking of the traditional collocation arrangements currently being offered by ILECs. Existing collocation arrangements, which vary widely from ILEC to ILEC and central office to central office, are inefficient, expensive, and too complex for the needs of today's competitive entrants.

The Commission should eliminate ILEC restrictions on the equipment that may be collocated. Such restrictions are vestiges of the past. For example, it would not serve anyone's purpose to differentiate between circuit-switched and packet-switched equipment in determining which type of equipment may be collocated. The approach of restricting switching equipment appears to be left over from an overly-cautious first generation collocation approach that does not fit with the competitive local marketplace envisioned by the Commission today. The Commission should go a step further and adopt rules permitting the collocation of *any* equipment used by carriers in the provision of local exchange or exchange access voice and data services. The sole criteria for determining whether a particular type of equipment may be collocated should be its size and the space available at the location in question. Leaving the door open for the ILECs to impose any other restrictions simply invites them to act as network police against their competitors.

The national model for collocation to minimize space requirements should be cageless collocation, both in the advanced services context and generally. Such a model simultaneously increases the amount of space available for collocation and permits CLECs to achieve greater cost efficiency by providing them with an amount of space that does not exceed their needs. The Commission should also adopt national standards to govern the

collocation ordering process, preparation of the collocation space, and deployment of the collocated equipment. In particular, the Commission should require standardized service and installation intervals within which all ILECs must respond to CLEC collocation requests.

As with collocation of CLEC equipment at ILEC premises, the Commission should adopt national standards as minimum requirements for local loops that apply to all services. National standards would help ensure that the ILECs deploy the pre-provisioning processes, provisioning processes, and engineering processes necessary to support the policies set forth in the Act and in the Commission's rules, including the deployment of advanced services. It is also of primary importance that ILECs be required to provision for CLECs *all* digital standards, not just the one or two standards that an ILEC itself elects to deploy (such as DSL).

The Commission should declare that all network elements used by the ILEC or its affiliate in the provision of advanced services are individual UNEs. With regard to resale, because advanced services will be offered primarily to residential and business end users, including ISPs, the Commission should require that all telephone exchange services predominantly offered to end users as advanced services be subject to resale under Section 251(c)(4), without regard to their classification by the Commission or ILEC as telephone exchange service or exchange access. Such a finding should encompass all advanced services, including those configured in the future, and not be limited to DSL services.

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COMMENTS OF ICG TELECOM GROUP, INC.

ICG Telecom Group ("ICG") hereby submits its comments regarding the Notice of Proposed Rulemaking released August 7, 1998 in the above-captioned proceeding (the "Notice"). Section I of these comments addresses the Commission's proposal to allow incumbent local exchange carriers ("ILECs") to provide advanced telecommunications services through separate, nonregulated subsidiaries. Section II urges the Commission to take extensive measures to promote local competition by supporting the efforts of competitive local exchange carriers ("CLECs") to enter the market on a level playing field.

STATEMENT OF INTEREST

ICG, the largest "facilities-based" CLEC that is not affiliated with a major interexchange carrier ("IXC"), has an interest in this proceeding. ICG is a leading national CLEC with extensive fiber-optic networks. ICG offers local, long distance and enhanced

telephony and data services in the states of California and Colorado, as well as the Ohio Valley and parts of the Southeastern United States.

ICG has merged with NETCOM On-Line Communication Services, Inc. ("NETCOM"). NETCOM is one of the leading ISPs in the country, and as of December 31, 1997, was providing service to approximately 540,000 customers and over 12,000 professional businesses.

DISCUSSION

I. APPLICABILITY OF SECTION 251(C) TO INCUMBENT LOCAL EXCHANGE CARRIERS

In the order portion of the Notice, the Commission concludes that ILECs are subject to Section 251 of the Communications Act, as amended (the "Act"), 47 U.S.C. § 251, in their provision of advanced telecommunications services. ICG applauds this result. ICG agrees with the Commission that both the plain language of the Act and the pro-competitive policies that it is designed to promote require such treatment of advanced services. Section 251 was intended to open the local market to competition by ensuring that new entrants would have access to the incumbents' networks. As ever-increasing amounts of traffic are moved from the circuit-switched voice network to packet-switched data networks, it would render Section 251 meaningless if it were read to include only conventional voice telephony. With its ruling, the Commission has taken an important step in ensuring that real competition can flourish as technologies change and evolve.

In the Notice portion of the item, however, the Commission proposes to allow the ILECs to offer advanced telecommunications services through separate, nonregulated

affiliates that would *not* be subject to Section 251. In the Commission's view, if the advanced services affiliate is sufficiently independent from its counterpart ILEC, it is excluded from Section 251(h)'s definition of "incumbent local exchange carrier" and thus from the obligations imposed on ILECs by Section 251(c).

ICG believes that the Commission's interpretation of Section 251 is unfounded. First and foremost, as discussed in Section A.1 below, ICG believes that the Commission's reading of Section 251 is beyond its legal authority. If Section 251 means what it says, the ILECs cannot escape their obligations thereunder by a shuffling of corporate entities.

Second, as discussed in Section A.2 below, the Commission's proposal will eviscerate the correct policy result reached in the order portion of the Notice by creating a vehicle for the ILECs to make an end run around Section 251. ICG is very concerned that the Commission's proposal will allow the ILECs to divert facilities and service offerings to their advanced services affiliates. As the ILECs shift as much of their operations as possible to their advanced services affiliates in order to escape regulation, the ILECs will become empty shells, whose obligation under Section 251 to make their facilities available to competitors is meaningless.

Third, as discussed in Section A.3 below, under the Commission's proposal, the ILEC and its affiliate can work in concert to ward off competition. The advanced services affiliate would not be an economically independent entity under the Commission's proposal. Rather, the affiliate would be either a wholly-owned subsidiary of the ILEC or of the ILEC's holding company. This will allow the ILEC and its affiliate to engage in a number of anti-competitive strategies. For example, if the ILEC was in danger of losing a

valuable customer to a CLEC, the ILEC's affiliate could purchase from the ILEC the facilities necessary to provide service to the customer and then re-price the service at off-tariff rates. Even if this resulted in a loss to the affiliate, it would still make sense from the perspective of the overall corporate enterprise because it would prevent the loss of the revenue generated by the customer to a real competitor.

While the Commission acknowledges the possibility that ILECs "could improperly discriminate against competing providers . . . in order to gain a competitive advantage for their advanced services affiliates," Notice at ¶ 97, the Commission does not address the concerns with its proposal identified above. Because the Commission does not focus on these very real threats to competition, the safeguards it has proposed to ensure that the ILECs and their advanced services affiliates operate independently are inadequate. If the Commission decides to proceed with its separate subsidiary proposal, it is critical that it put into place additional safeguards. In Section B below, ICG proposes a number of additional protections designed to ensure that the ILECs' advanced services affiliates are completely independent entities by making the affiliates solely responsible for their own bottom line.

A. The ILECs Should Not Be Allowed to Offer Advanced Telecommunications Services Through Nonregulated Affiliates

1. The Commission Lacks the Authority to Adopt its Separate Subsidiary Proposal

As a threshold matter, ICG believes that the Commission's proposal to allow the ILECs to offer advanced services through separate, nonregulated subsidiaries flies in the

face of Section 251 and is thus beyond the scope of the Commission's lawful authority. ICG fully supports the comments of the Association for Telecommunications Services ("ALTS") and the Competitive Telecommunications Association ("CompTel") with respect to the Commission's authority to permit ILECs to escape the obligations of Section 251 by offering advanced services through nonregulated separate subsidiaries. Rather than repeat those arguments, ICG hereby incorporates herein by reference the relevant portions of the ALTS and CompTel comments.

2. The Separate Subsidiary Option Will Allow the ILECs to Circumvent Their Section 251 Obligations

Not only is the Commission's proposal legally questionable, permitting ILECs to offer advanced services through a nonregulated affiliate is very troubling from a policy perspective. The Commission's proposal threatens to undercut its determination that the ILECs should be bound by Section 251 in their provision of advanced services. The danger is that the ILECs can divert so much of their operations to their unregulated affiliates that the regulated ILEC entity that is subject to Section 251 and a host of other regulatory safeguards will become little more than a shell.[1]

The concerns arising from the ILECs using their advanced services affiliates to circumvent Section 251 is exacerbated by the Commission's overly-broad definition of

[1] A related danger posed by the Commission's proposal is that it will allow the Bell operating companies ("BOCs") to gain access prematurely to in-region long distance markets. The BOCs need full compliance with Section 251 before they will be permitted to offer interLATA service under Section 271. To the extent that the BOCs can shift large portions of their operations to nonregulated affiliates not governed by Section 251, the bar for Section 271 will be drastically—and artificially—lowered.

advanced services. While much of the Notice speaks in terms of various xDSL technologies, the Commission makes clear that advanced services can encompass much more: "For purposes of this item, we use the term 'advanced services' to mean wireline, broadband telecommunications services, such as services that rely on digital subscriber line technology (commonly referred to as xDSL) and packet-switched technology." Notice, ¶ 3.

The danger is that instead of becoming a limited-purpose affiliate, the advanced services affiliates envisioned by the Commission will come to be the principal service provider. Indeed, many commenters are already predicting that in the near future, telephony will become so "data-centric" that conventional voice telephony will be nothing more than an adjunct to data service offerings. As new technologies continue to replace the old twisted copper pair, as they inevitably will, the ILECs will be free to place all their new facilities and services in their affiliates simply by labeling them "advanced services." To illustrate the overbreadth of the Commission's proposal, one only need note that the Commission offers "packet-switching" as an example of an advanced service. Notice at ¶ 3. Packet-switching is hardly a new technology; the Commission held that certain packet-switching technologies were basic transmission services nearly two decades ago. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC Rcd 2d 384, 420 (1980). The ILECs cannot be allowed to use the Commission's advanced services affiliate proposal as a means to essentially provide all their services outside of regulatory curbs.

3. The Safeguards Proposed by the Commission Will Not Prevent the ILECs and Their Affiliates from Acting in Concert, to the Detriment of Competitors

In addition to permitting wholesale shifting of the ILECs' operations to their affiliates, the Commission's separate subsidiary proposal will afford the ILECs an anti-competitive opportunity to lock-up the their existing customers and pursue new customers by acting in concert with their affiliates. Under the Commission's proposal, the affiliate could be a wholly-owned subsidiary of the ILEC. This means that any transactions between the ILEC and the affiliate will be revenue-neutral from the perspective of the enterprise as a whole.[2] This in turn will lead to joint decision-making and business planning. Neither the ILEC nor the affiliate will have an incentive to operate the affiliate as an independent business. Instead, the affiliate will be operated to maximize the enterprise's overall revenue. While the affiliate may cannibalize some of the ILEC's business, that is from the ILEC's perspective a vastly preferable result to losing that same business to a real CLEC competitor. So long as all of the revenue stays in the family, the overall enterprise, and its investors, would be indifferent as to which of its entities generated the revenue.[3]

For example, the advanced services affiliate would have the ability to introduce targeted, customer-specific contract service arrangements ("CSAs"), as well as reprice

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[2] This is particularly true under price cap regulation because the ILECs are not subject to rate of return regulation and, thus, everything goes to the ILEC's bottom line.

[3] This would be true even if the ILECs structure their operations so that the regulated ILEC and the nonregulated advanced services affiliate are both subsidiaries of the same holding company. *See* Notice at ¶ 11, n.17. Investors in the holding company will have little reason to care whether the profits are produced by one entity or the other, as long as the bottom line result is attractive.

existing services, without any obligation to offer these services at a wholesale discount price to its competitors. Obviously, if the same services were offered by the ILEC, they would be provided at tariffed retails rate from which potential competitors could obtain a discount. The incentive for the ILEC, therefore, would be to introduce new services through its affiliate, because the new services would then not be available to the ILEC's potential resale competitors at a resale discount.

The ILEC and its affiliate will also be able to gain an anticompetitive advantage over CLECs by having the affiliate recruit the ILEC's lucrative CSA customers. The ILECs have sought to deter CLECs from being able to do the same thing by imposing steep "termination" charges on CSA customers. While the affiliate would technically be assessed the same charge, it would be nothing more than the shifting of revenue from one corporate entity to another.

* * *

In sum, the ILEC advanced services affiliate will be able to establish itself as an alter ego free of Section 251 obligations. The ILEC has every incentive to shift the bulk of its operations to the affiliate, leaving the ILEC a shell of its former self. The presence of this affiliate will not lead to true local competition; it will be no more than an extension of a brand name from one entity (the ILEC) to another (the advanced services affiliate).

B. To the Extent the ILECs Are Permitted to Offer Advanced Telecommunications Services Through Nonregulated Affiliates, Robust Safeguards Must Be Put into Place to Protect Competition

If the Commission decides to move forward with its nonregulated separate subsidiary proposal, it must put into place robust protective measures to ensure that the

ILECs cannot use their advanced services affiliates to avoid their Section 251 and other regulatory obligations. The Commission recognized this in the Notice, and proposed a number of measures designed to achieve that goal. While, commendably, the separate subsidiary structure proposed by the Commission is a step in the right direction, it does not go far enough. In many instances, the measures proposed by the Commission are only a starting point, and there are important protections that the Commission has overlooked entirely. To be effective in curbing the ILECs' ability to use their advanced services affiliates to circumvent Section 251 and ward off competition, the Commission must put into place safeguards which will, as far as possible, remove the ILEC's incentives to do so.

1. Corporate Structure

To remove the incentive for the ILEC and its affiliate to engage in anti-competitive collaboration, the Commission must ensure that the ILEC and the affiliate are completely independent corporate entities. To this end, the Commission proposes requiring that (1) "the incumbent and affiliate must maintain separate books, records, and accounts" and (2) "the incumbent and advanced services affiliate must have separate owners, directors, and employees." Notice at ¶ 96.

While these measures are important, they do not go nearly far enough. As discussed above, the ILEC and its affiliate will have every reason to make collective decisions from the perspective of the entire enterprise rather than as individual entities. Requiring them to keep separate books and accounts will not alleviate this problem. If both the ILEC and its affiliate are contributing to the same overall bottom line then it does

not matter if one shows a loss and one a profit, so long as the overall enterprise is earning sufficient profits.

In order to ensure real independence, the Commission must require significant public ownership in the ILEC's advanced services affiliates. If the affiliate's shares are owned and traded by persons or institutions expecting to earn profits from the affiliate's operations without regard to the affiliate's relationship with the ILEC or overall parent company, the affiliate will have the proper incentive to look to its own—rather than its corporate family's—bottom line. Not only will the affiliate owe its shareholders a fiduciary duty to maximize their profits, but it would also be subject to suits from its shareholders if it compromises their interests.

The Commission should carefully consider what level of public ownership is necessary in order to establish the affiliate as a truly separate entity in terms of an independent motivation to grow and prosper without regard to the impact of the ILEC's profitability. ICG believes that the level of public ownership should be substantial. At a minimum, the level of public ownership should be at or above 20% in order to trigger independent tax returns.[4] The filing of independent tax returns will prevent the ILEC and its affiliate from hiding transfers that result in a loss to one entity while resulting in an overall gain by burying the transaction in aggregated figures contained in a consolidated filing. The affiliate's shareholders will thus have access to the information necessary to police the affiliate and to ensure that their—not the ILEC's—interests are being served by

the affiliate's business plans.[5] This in return will reinforce the affiliate's obligation to its shareholders.

To further ensure that the affiliate acts in the interests of its shareholders, the Commission should require that its board and management team be truly independent. No director of the affiliate nor member of its senior management should have (1) any financial interest in the ILEC or in an overall parent company or (2) any employment or consultant relationship with the ILEC or the overall parent. In addition, compensation for the affiliate's management team must be tied only to the financial performance and well-being of the affiliate, not the overall enterprise. There can be no incentive plans based on how the whole enterprise does.

2. Personnel

To ensure completely separate corporate structures, the Commission must also restrict the ability of the ILEC and its affiliate to shuffle personnel among themselves. Any requirement that the ILEC and its affiliate have separate employees would quickly become a meaningless technicality if the two companies are free to churn the same personnel back and forth.

Allowing the transfer of personnel raises a number of significant concerns. First, there is a danger that an ILEC could indirectly subsidize its advanced services affiliate by deliberately transferring to the affiliate the most highly skilled employees—including

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[4] The affiliate should also be required to make separate Securities and Exchange Commission filings.

[5] The converse would, of course, be true for the ILEC's shareholders.

employees in whom the ILEC has invested substantial training and with whom CLECs have built substantial relationships. This is not a hypothetical concern. In the course of negotiating its interconnection agreements, ICG has had the experience time and time again of having the ILEC rotate experienced personnel familiar with CLEC operational needs off of either the ILEC's negotiating team or the customer service group that works with the CLEC account. Second, there is the potential for the ILEC to transfer to its affiliate employees that have competitively sensitive information. For example, the transfer of marketing personnel who have special knowledge of the ILECs larger customers would enable the advanced services affiliate to gain a major competitive advantage over its CLEC competitors in marketing to those customers. Similarly, the transfer of engineering personnel with special technical knowledge of the operation of the ILECs network would provide the affiliate with a major competitive advantage.

While restrictions on the transfer of personnel may be difficult to police directly, the Commission could discourage the ILEC and its affiliate from shuffling personnel by putting into place measures that would make the transfer unattractive from the employee's point of view. The Commission should require employees who transfer from the ILEC to the affiliate or vice versa to start over in terms of years of service, pension and stock option vesting, and seniority status.

3. Transfer of Assets

To prevent the ILECs from avoiding their Section 251 obligations by transferring all of their operations to their affiliate, ICG agrees with the Commission that, if an ILEC transfers to its affiliate any network elements or local loops that must be provided

on an unbundled basis pursuant to Section 251(c)(3), the affiliate should be deemed to be an assign of the ILEC with respect to those network elements or loops. Notice at ¶ 105, 107. The Commission, however, should go further. *Any* transfer of a network element or loop subject to Section 251(c)(3) should render the affiliate an assign of the ILEC generally, not merely with respect to the element or loop in question. Only such a bright-line rule will prevent the ILECs from avoiding their Section 251 obligations.

Under no circumstances should the ILEC be permitted to transfer embedded customers to its affiliate without giving CLECs the opportunity to compete for those customers on a nondiscriminatory basis. The Commission addressed this issue in a similar setting in its proceeding concerning BOC marketing of CENTREX equipment through sales subsidiaries. There, the Commission rejected the compliance plans filed by Ameritech and NYNEX because the plans permitted the BOCs to convert their existing customers to their affiliates "without first offering the same opportunity to outside vendors." American Information Technologies Corp., 59 RR2d 309, 316 (1985). The Commission held that this permitted Ameritech and NYNEX to "improperly discriminate[] in favor of their own subsidiaries." *Id.* Similarly, it would give the ILECs a discriminatory advantage if they were permitted to convert their current customers to their advanced service affiliates without allowing their competitors an equal opportunity to obtain the customer.

4. Dealings Between the ILEC and its Affiliate

In the Notice, the Commission proposes to require that all transactions between the ILEC and its affiliate be on an arm's length basis and be made public. Notice at ¶ 96.

According to the Commission, this will serve to (1) ensure that CLECs receive treatment equal to that afforded by the ILEC to its advanced services affiliate and (2) prevent improper cost allocations between the ILEC and the affiliate. The Commission also proposes to generally prohibit ILECs from discriminating in favor of their affiliates. *Id.*

a. Nondiscrimination

To put some teeth into its nondiscrimination requirement, the Commission should make clear that the ILEC must deal with its affiliate on *exactly* the same basis that it deals with CLEC competitors. Among other things, this means that the affiliate must use the same OSS and other interfaces used by CLECs to purchase inputs from the ILEC. Equally as important, the ILEC must be prohibited from endorsing or recommending its affiliate to its customers. Specifically, the Commission should (1) prohibit the ILEC from transferring customer calls to its affiliate and (2) require that ILEC customers who inquire about services that are offered both by the ILEC's affiliate and competing providers should be referred in a nondiscriminatory manner.

b. Resale Prohibited

Resale is an important concern that the Commission leaves entirely unaddressed. The advanced services affiliate must not be permitted to resell the ILEC's service. If the affiliate is allowed to do so, then it can circumvent the ILEC's obligation to provide service at tariffed rates and on a nondiscriminatory basis by purchasing services from the ILEC under tariff and then re-pricing those services to its subscribers as it sees fit. This in turn allows the ILEC to use its advanced services affiliate as a shield against competition. If an ILEC is threatened with the loss of a customer because a CLEC is able to underprice its

service offering, it would be able to provide the service offering on a resale basis to its affiliate, which could then price the service as necessary to prevent losing the customer. From the perspective of the ILEC's overall corporate enterprise, it is far better to keep the customer within the enterprise at reduced profits, and to block a competitor from gaining the revenue, than to lose the customer.

5. Co-Branding

The Commission must ensure that the advanced services affiliate is not able to gain an unfair advantage over its CLEC competitors by trading on the brand recognition and goodwill of its ILEC counterpart. The affiliates are likely to brand their service offerings under a name very similar to their ILEC partner's in order to take advantage of the corresponding goodwill. For example, BellSouth's existing CLEC is known as BellSouth BSE and BellSouth has indicated that BellSouth BSE will make use of BellSouth's trademark depicting a bell. Therefore, a consumer that wants service from "BellSouth" may have little reason to know or care if it is provided by the ILEC or by the similarly-named affiliate. To prevent the affiliate from receiving an unfair advantage from its counterpart ILEC's branding, the Commission should require advanced services affiliates to market themselves as wholly separate identities under names and identifying logos clearly different from their ILEC counterpart's.

6. Relationship of Advanced Services Affiliate to CLECs

In addition to putting into place the measures necessary to ensure that the ILEC and its advanced services affiliate are sufficiently independent, the Commission also must ensure that the affiliates comply with their obligations under Section 251 with respect to

CLECs. While, under the Commission's proposal, an advanced services affiliate meeting the necessary requirements would not be bound by the obligations placed on ILECs by Section 251(c), they would, of course, be bound like any other LEC by the requirements of Section 251(a). Under Section 251(a), the affiliates would be required to interconnect their data networks with other carriers, including CLECs. 47 U.S.C. § 251(a). The Commission should make this point absolutely clear. With more and more traffic being moved off the circuit-switched network and on to advanced data networks it is critical that CLECs are able to interconnect their networks with other data networks to ensure that their customers can reach other carriers' subscribers.

II. The Commission Should Take Extensive Measures to Promote Competition in the Local Market by Supporting the CLECs' Ability to Compete

A. Collocation Requirements

1. National Standards

The Commission should adopt national standards for collocation for all services. The standards should reflect a fundamental re-thinking of the traditional collocation arrangements currently being offered by ILECs.[6] Existing collocation arrangements, which vary widely from ILEC to ILEC and central office to central office, are inefficient, expensive, and too complex for the needs of today's competitive entrants. National standards will help bring certainty and stability to new entrants and, therefore, encourage

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[6] The Commission should refer to the extensive white paper on collocation by CompTel, entitled: Uncaging Competition: Reforming Collocation for the 21st Century,

the deployment of an advanced services network. The individual states should, of course, retain the option of imposing additional requirements.

2. Collocation Equipment

ICG agrees with the Commission's tentative conclusion that "incumbent LECs should not be permitted to impede competing carriers from offering advanced services by imposing unnecessary restrictions on the type of equipment that competing carriers may collocate." Notice at ¶ 129. Such restrictions are vestiges of the past. For example, it would not serve anyone's purpose to differentiate between circuit-switched and packet-switched equipment in determining which type of equipment may be collocated. The Commission has never advanced any meaningful reason for not requiring ILECs to collocate switching equipment. Instead, the approach of restricting switching equipment appears to be left over from the Expanded Interconnection proceeding, which reflects an overly-cautious first generation collocation approach that does not fit with the competitive local marketplace envisioned by the Commission today.[7] The Commission in the Local Competition Order stated that it would reexamine the issue of collocation of switching equipment at a later date "if it appears that such action would further achievement of the 1996's Act's procompetitive goals." Local Competition Order at 15795. Obviously, the

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September 1998 ("CompTel White Paper"). ICG, which is a member of CompTel, has relied in part on the analysis set forth in that white paper.

[7] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC Rcd 15499, 15795 (1996) ("Local Competition Order").

time is now for the Commission to reexamine in this proceeding its earlier approach and eliminate any restrictions in the collocation of switching equipment.

The Commission should go a step further and adopt rules permitting the collocation of *any* equipment used by carriers in the provision of local exchange or exchange access voice and data services. The sole criteria for determining whether a particular type of equipment may be collocated should be its size and the space available at the location in question. Leaving the door open for the ILECs to impose any other restrictions simply invites them to act as network police against their competitors. In addition, whether or not a particular piece or type of equipment is collocated by an affiliate of the ILEC -- if any,[8] the ILEC should allow CLECs to collocate the equipment required by the CLEC for its offerings.

Any restrictions that are based on a particular type of equipment will likely become obsolete very quickly, as the pace of technological change continues to blur the distinctions between types of telecommunications equipment. Nor should the ILEC be allowed impose restrictions based on the use of the equipment. Much equipment today is multi-functional and cannot readily be classified by use. As the Notice appears to foresee, the use of increasingly multi-functional, integrated equipment will likely be an important

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[8] The Commission's Notice seeks comment in a number of areas about whether the CLEC should receive service equal to that provided by an ILEC to the ILEC's advanced services affiliate. ICG argues above in these comments that the Commission should *not* permit the ILECs to establish affiliates for the purpose of offering advanced services. Any statement by ICG concerning an ILEC affiliate should *not* be construed as support for such an entity. Instead, references to ILEC affiliate are made only to respond to the specific language of the Notice.

means of achieving greater cost efficiency. Id. The Commission should not allow the ILECs to forestall that likelihood.

In addition, the ILEC should not be able to advance unilaterally routine, non-specific network safety concerns as a way of precluding the collocation of any equipment. The Commission is correct in observing that "[s]ome performance and reliability requirements...may not be necessary to protect LEC equipment" and "may increase costs unnecessarily." Notice at ¶ 134. Any piece of equipment that meets industry standards should be allowed for collocation, as long as the equipment is certified that it will not harm the network. The network-harm standard is consistent with the standard the Commission has required in other areas, such as Part 68 of the Commission's rules.[9] In addition, a CLEC should be able to use any type of equipment that the ILEC uses, without the need for the CLEC to obtain certification.[10] All equipment specifications and safety requirements must apply equally to the ILEC, ILEC affiliates (if any), and all CLECs.

The Commission should draw the line elsewhere, however on collocation equipment. The Commission should not permit collocation of equipment used by non-carriers, as such equipment could exacerbate any potential space exhaustion problems. ICG

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[9] See also Hush-A-Phone v. United States, 20 FCC 391 (1955), under which network equipment must be privately beneficial without being publicly detrimental. CLECs are seeking to collocate equipment that would be privately *and publicly beneficial.*

[10] To the extent that an ILEC wants to impose additional safety requirements, such requirements must be for a specific and justifiable purpose. The requirements must also be narrowly tailored to achieve the stated purpose. ILEC safety requirements meeting this test should be permitted to go into effect only after the ILEC has notified each CLEC customer at least one year prior to the effective date to ensure that all parties can plan around such contingencies.

supports the Commission's tentative conclusion that it "should continue to decline to require collocation of equipment used to provide enhanced services." Notice at ¶ 132. Nor should the Commission permit ILECs to reserve large amounts of space for future "turn-around" replacements of existing equipment, whereby the ILEC reserves space that is roughly equal in size to the equipment that will one day need to be repaired or replaced. ILECs should not be allowed to use a "turn-around" rationale to engage in de facto warehousing of space. In addition, ILECs should be required to be more specific in their schedules to replace equipment.

CLECs should have the unfettered right to cross-connect between any CLEC collocation spaces within the same ILEC central office. Such capabilities will often be more cost efficient for individual CLECs and may have the potential of minimizing collocation space needs. Although the Commission's rules have permitted cross-connects, the ILECs have imposed requirements that make this ability burdensome and inefficient. For example, instead of permitting a CLEC to cross-connect its equipment directly with that of another CLEC, the ILEC may require that the initial connection be made to the ILEC, which the ILEC in turn connects to the second CLEC. There is no reason, however, for the ILEC to be involved in the cross-connect at all, particularly when the ILECs' involvement could lead to additional points of failure through extra cross-connections. Therefore, the Commission should end such artificially introduced inefficiency and ensure that CLECs can directly cross-connect their equipment with that of other CLECs without any unnecessary involvement by the ILEC.

3. Allocation of Collocation Space

a. Cageless Collocation

The advent of advanced services technology will likely lead to greater collocation demands from carriers as they move into new classes of data services, which could lead to overcrowding in many central offices. On the other hand, the equipment collocated at the ILEC's premises will be "of decreasing dimension and increasing functionality." CompTel White Paper at 27. The Commission should, therefore, adopt national standards for collocation space allocation that "minimize the space needed by each competing provider in order to promote the deployment of advanced services to all Americans." Notice at ¶ 137. ICG believes that "[m]ore cost-effective collocation solutions may spur collocation in residential and less densely populated areas." Id. at ¶ 138.

The national model for collocation to minimize space requirements should be cageless collocation, both in the advanced services context and generally. Such a model simultaneously increases the amount of space available for collocation and permits CLECs to achieve greater cost efficiency by providing them with an amount of space that does not exceed their needs. ILECS frequently foster inefficient use of space at their locations through various requirements, such as mandating that each collocation "cage" enclosure be a minimum of as much as 100 square feet, or prohibiting the subleasing or sharing of caged space.

To make "cageless" physical collocation work, the Commission should adopt national standards that include requiring ILECs to take affirmative steps to make more space available for CLEC equipment, such as "remov[ing] obsolete equipment and non-

critical administrative offices in central offices to increase the amount of space available for collocation." Notice at ¶ 142. The Commission should also include within its standards a provision that would make a particular CLEC responsible for only its share of the cost of preparing the collocation space, based on the percentage of the total space it is occupying, whether or not other competing CLECs or ILEC affiliates, if any, are immediately occupying the rest of the space. Of course, the individual states should have the ability to exceed the minimum collocation requirements established by the Commission's national standards.

The Commission should also adopt national standards to govern the collocation ordering process, preparation of the collocation space, and deployment of the collocated equipment. In particular, the Commission should require standardized service and installation intervals within which all ILECs must respond to CLEC collocation requests. There should be little or no lag time for the ILEC to begin acting on an order once it is received, and in the event of any misunderstanding regarding whether a particular order was made, it should be up to the ILEC – the party tasked with carrying out the order -- to rebut the presumption that the order was in fact made.[11] In addition, substantial delays in preparing collocation space are often the result of a lack of resources devoted by the ILEC

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[11] ICG recently had an experience with one ILEC where ICG and the ILEC discussed by telephone on several occasions three orders by ICG for six collocations in three states. Yet, when it came time to prepare the spaces, the ILEC claimed that it had never received any of ICG's written orders, which had been sent by ICG several weeks previously. Throughout all of the previous conversations, the ILEC had given no indication to ICG that the ILEC did not have the orders in hand, even when ILEC personnel were well aware of the approaching date of deployment.

to such activities, particularly in those areas where demand for collocation is high. To address this recurring problem, the Commission should require the ILECs to identify additional third-party vendors available to prepare space as needed.

Cageless collocation can be configured in two different ways: (1) common-space cageless collocation; and (2) co-mingled/shared space cageless collocation. Common-space cageless collocation segregates ILEC equipment from that of the CLECs. Within the CLEC common area, however, the equipment of individual CLECs is not separated by cages or other dividers. With co-mingled space cageless collocation, CLEC equipment is installed in the same area as used by the ILEC. This arrangement is similar to virtual collocation, the difference being that the CLEC retains control over its equipment for purposes of upgrades, maintenance and repair.

ICG believes co-mingled space cageless collocation is the better of the two cageless alternatives. First and foremost, co-mingling lessens space exhaustion problems. Second, ILECs and CLECs are located within the same space, so there would be no non-discrimination concerns. Either alternative, however, is preferable to existing "caged" collocation.

b. Other Collocation Alternatives

The alternatives to cageless collocation suggested by the Notice, such as the use of shared collocation cages or the use of cages of any size, should be rejected because they attempt to mitigate the ILECs' over-response to a problem that is relatively minor: security of the LEC premises. The Commission should no longer permit the security tail to wag the collocation dog. Indeed, much of today's "security" concerns date to the initial period

of collocation when ILECs had far less experience in opening their networks to competitors. In any event, "security is not an absolute concept. Rather, there are different levels of security, with increasing levels of protection and cost." CompTel White Paper at 30.

The Commission's Notice evidences awareness of security solutions, such as "concealed security cameras or badges with computerized tracking systems," that would be more than adequate and cost-effective for all parties concerned. Notice at ¶ 141. With such measures in place, there is no need for either cages or security escorts. Other common-sense steps the ILEC can take to address security concerns are the proper labeling of equipment so errors by technicians are curtailed and the provision of locking cabinets (which are distinct from "cages") for those customers who prefer them.

The Commission should also reject ILEC arguments that its competitors could gather sensitive marketing data by being able to walk around the premises without an escort. Such concerns are overblown in an environment where all carriers, particularly the ILECs, trumpet their latest business plans and advanced services capabilities in frequent press releases well in advance of deployment. In sum, the Commission's tentative conclusion that "carriers should be able to resolve any security concerns raised by cageless collocation" is correct, but only if the Commission makes clear that "security" should not be a significant stumbling block and cost causer in collocating equipment.

Should the Commission choose to explore collocation alternatives other than cageless collocation, the Commission should mandate smaller physical collocation requirements (or no minimum amount of space) to avoid wasting scarce collocation space,

as it proposes in the Notice. Similarly, the Commission should remove restrictions that prevent shared collocation space through subleasing or sharing. ICG agrees with the Commission's tentative conclusion that if an ILEC offers a particular form of physical collocation at any location, "such a collocation arrangement should be presumed to be technically feasible at other LEC premises." Id. at ¶ 139.

4. Exhaustion of Collocation Space

While space exhaustion may grow as a concern for a few ILEC premises, limitations on available space should not hinder physical collocation in most ILEC locations, particularly as ILECs continue to discard large, obsolete pieces of equipment and reduce non-critical staff space. To facilitate physical collocation, the ILEC should provide information about available collocation space, including detailed floor plans of ILEC central offices, on at least a quarterly basis. This information should include locations with potential limitations on collocation. ILECs should prioritize activities to improve availability of space in Central office locations based on forecasts received from CLECs. Rather than responding to carrier requests for this information, which could lead to possible delays, the ILEC should be required to post collocation space information on a web site established specifically for that reason, which is an appropriate means of giving notice to parties only in this particular, narrowly drawn circumstance. This will allow CLECs to formulate plans according to space availability and will reduce the resources the ILEC needs to devote to responding to CLEC inquiries.

Collocation space should be assigned on a first-come, first-served basis. Carriers, including any affiliate of the ILEC, should not be permitted to warehouse space for any purpose, including the "turn-around" replacement of existing equipment.

In those locations where the ILEC reports that space is unavailable, the Commission should require that CLECs requesting collocation space be allowed to tour the ILEC's premises without charge to "enable competing providers to identify space that they believe could be used for physical collocation." Notice at ¶ 146. In the event of disagreement about the ultimate use of space at a particular premises, "both carriers could present their arguments to the state commission." Id. The state commissions should be provided with detailed floor plans that specify how the space is used within the particular location to allow a commission to engage in a constructive discussion with the carriers after the CLEC's tour of the premises.

The use of virtual collocation as an alternative to physical collocation should only be weighed as an option when the ILEC has met all other requirements under the Commission's national standards and is still unable to accommodate a CLEC's request for physical collocation. It is difficult to imagine, however, an instance where virtual collocation would be the *only* alternative, especially since the only principal difference between cageless physical collocation and virtual collocation is the CLEC's ability in the former to install, maintain, and repair its own equipment. Therefore, virtual collocation can easily be translated into cageless physical collocation by providing that access to the CLEC. In any event, to ensure that a virtual collocation offering is provided to CLECs on

non-discriminatory terms and conditions, all CLECs must be offered the same virtual collocation arrangements as the ILEC's advanced services affiliate (if any).

Finally, the Commission should prohibit ILEC policies and practices that may contribute to exhaustion of physical collocation space, such as setting minimum sizes for collocation or requiring the use of separate equipment for cross-connection to UNEs and tariffed services, even when the equipment can serve both more efficiently (such as a multiplexer). Such practices are inefficient from both a cost and a space perspective, and only serve to frustrate competition.

5. Effect on Existing Agreements

The Commission seeks comment on how its "tentative conclusions and rule proposals relating to collocation may affect existing collocation requirements." Notice at ¶ 150. ICG believes that the Commission's adoption of national standards on collocation should enable a "fresh look" at the collocation provisions in existing interconnection agreements.

B. Local Loop Requirements

1. National Standards

As with collocation of CLEC equipment at ILEC premises, the Commission should adopt national standards as minimum requirements for local loops that apply to all services. National standards would help ensure that the ILECs deploy the pre-provisioning processes, provisioning processes, and engineering processes necessary to support the policies set forth in the Act and in the Commission's rules, including the deployment of

advanced services. It is also of primary importance that ILECs be required to provision for CLECs *all* digital standards, not just the one or two standards that an ILEC itself elects to deploy (such as DSL). ICG notes that the Commission's statements to that effect in the Notice are already beginning to have a positive effect, as ILECs begin to provision for more digital standards. The Commission's national standards should pertain to nondiscriminatory access to OSS, loop spectrum management, attachment of electronic equipment at the central office end of the loop, and the unbundling of loops passing through remote terminals.

National standards would establish at least a minimum level of uniformity and predictability that would encourage the widespread deployment of advanced services by multiple providers. Investors, too, would likely be willing to commit more resources in an environment of increased stability. In this area, as well as the others, the states should retain the ability to adopt requirements in addition to the minimum requirements set forth in the Commission's national standards. The existence of national standards would also be an invaluable enforcement tool in that it would be easier for the Commission and the states to identify a situation requiring enforcement intervention. In addition, a body of experience in working with the national standards would increasingly provide the Commission and the states an ability to resolve complaints in an expedited manner.

2. Loops and OSS

ICG supports nondiscriminatory access to information concerning loops for *all* advanced services, including current information on digital loop carriers ("DLCs"). This information should be provided to CLECs through access to the same operational support

systems ("OSS"), systems that are used by the ILEC and the ILEC's affiliate (if any). As stated by the Commission, "incumbent LECs should provide requesting competitive LECs with sufficient detailed information about the loop so that competitive LECs can make an independent determination about whether the loop is capable of supporting the xDSL equipment they intend to install." Notice at ¶ 157. Such information will differ in specificity and quantity, depending on the precise technology the CLEC intends to use at any given point in time. At a minimum, the ILECs should provide CLECs with OSS access concerning the following: loop length; gauge of cable; digital loop presence; presence of load coils; presence of bridge taps or repeaters; and presence of any potential disturbers.

To ensure that the information will be of maximum utility, the Commission should require the ILEC to keep its records current and to provide information that is equivalent to that received by the ILEC or the ILEC's affiliate (if any). The ILECs generally have detailed inventory information available internally for the ILECs' deployment of its own advanced services. The information provided to CLECs, however, should not be limited to merely the particular type of advanced service deployed by the ILEC, but should concern *all* advanced services. In addition, the ILEC should be required to include within this information any plans to migrate loops to DLC configuration at least six months before the plans are put into effect. With respect to loops that are already provisioned to the CLEC for the CLEC's provision of advanced services, the ILEC should not be permitted to transition such loops to DLC configuration.

The Commission should also adopt minimum standards for the conditioning of loops to support particular CLEC requirements. ILECs have a powerful incentive to slow the effective entry of competitors.

3. Loop Spectrum Management

The Commission should adopt national standards for loop spectrum management of different signaling formats on copper pairs in the same bundle. The ILECs should not be permitted to define unilaterally the "spectral mask" in a way that will disadvantage competitors. For example, while there may be some legitimate "crosstalk" or interference concerns with digital services, spectrum management should not be geared to replicate optimal, laboratory-like conditions. The relative spectral compatibility and the level of interference that can be tolerated between digital signals should be determined by a neutral standards-setting body, as the Commission appears to recognize in the Notice. The Commission should restrain ILECs from imposing any requirements that are inconsistent with the standards ultimately set by that neutral body. Such standards should apply equally to the ILEC, the ILEC's affiliates (if any), and the CLECs.

ICG supports the right of two different service providers to offer services over the same loop. In addition, such services from the respective providers should be permitted to be different, such as mixing voice and data services, and in any combination the CLEC

chooses. To achieve a mix of services, CLECs should be allowed to use any technology, including but not limited to, a splitter at the customer's premises.[12]

4. Attachment of Electronic Equipment at Central Office End of Loop

The Commission should adopt uniform national standards, which apply to the equipment of both the ILEC and the CLEC, for electronic equipment at the central office end of a loop. Uniform standards are preferable to having each ILEC set its own requirements, which has the potential for confusion and delay.

5. Redefining the Local Loop for Advanced Services Enhancement

As advanced services technology and capabilities continue to evolve, the Commission should adopt a definition of the loop that will ensure continued CLEC access to all loop functionalities needed to offer existing and future advanced services. The definition must be fluid enough to encompass unforeseen circumstances without the necessity of seeking a formal revision from the Commission. At a minimum, the definition of "local loop," irrespective of the type of service, should encompass the loop from the customer's premises, through any remote terminals, through the ILEC central office, and to the point of collocation.

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[12] As discussed elsewhere in these comments, ICG strongly believes that ILEC affiliates, should the Commission choose to permit them, should not be allowed to resell the ILEC's services. In the event, however, that the Commission were to permit such resale by the ILEC affiliates, ICG would support the Commission's tentative conclusion that "any voice product that the incumbent LEC provides to its advanced services affiliate would have to be made available to competitive LECs on the same terms and conditions." Notice at ¶ 162.

6. Unbundling of Loops Passing Through Remote Terminals

ICG supports the Commission's tentative conclusion that ILECs should be required to provide as UNEs DLC-delivered loops capable of transporting high-speed digital signals. There are unlikely to be situations in which offering such loops as UNEs is "technically unfeasible," although the ILEC should have the burden of proof if any instance does arise. In some cases, the DLC can be conditioned to support advanced services with no need for grooming. Conditioning might involve the change of a DLC line card to one that is compatible with the particular service to be provided by the CLEC. In the remaining cases, the ILEC should be required to groom the customer onto the dedicated copper or copper-fiber hybrid to support the service requested by the CLEC. In neither case should the existence of a DLC be an excuse for refusing to make the loop available. The ILEC should also be required to provision advanced services loops in the same manner that it provisions such loops for itself or its affiliate (if any).

ICG supports the Commission's tentative conclusion that a CLEC should be able to request any method of unbundling on the DLC-delivered loop that is technically feasible. Notice at ¶ 171. A CLEC should be able to request different methods of unbundling until such time as the ILEC satisfies the CLEC's request, and the CLEC receives an unbundling method that is at least equal in quality and functionality as the ILEC's loop. Grooming should always be an option for the CLEC, even if the ILEC has conditioned the DLC to support advanced services.

ICG supports the Commission's tentative conclusion that CLECs should not be "comparatively disadvantaged by incumbent LECs regarding provisioning of DLC-

delivered loops." Notice at ¶ 172. In particular, ICG supports the two examples the Commission gives to illustrate this principle: (1) CLECs should have access to parallel copper loops that bypass the DLC where relied upon by the ILEC or its affiliate; and (2) CLECs should be able to use a digital subscriber line multiplexer ("DSLAM") collocated at a remote terminal to provide advanced services, if the ILEC or its affiliate does so. Id. In addition, the deployment intervals for provisioning advanced services-compatible loops should be the same for ILECs and CLECs, regardless of whether the loop passes through a remote concentration device.

7. Effect on Existing Agreements

With regard to existing interconnection agreements, ICG believes that the Commission's adoption of rules on advanced services-capable loops should enable a "fresh look" at the local loop provisions within those agreements.

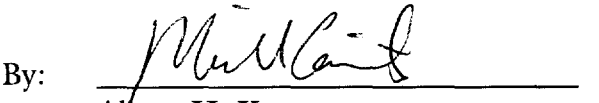
C. Unbundling Obligations

The Commission should analyze unbundling requirements for advanced services under both the proprietary standard in Section 251(d)(2)(A) and the impairment standard in Section 251(d)(2)(B), as either standard or both will be implicated. The Commission should declare that all network elements used by the ILEC or its affiliate in the provision of advanced services are individual UNEs. Such network elements that are to be considered UNEs include, but are by no means limited to, the DSLAM, customer ports on DSLAM, frame relay or packet-switch ports, the loop itself, and other electronics.

D. Resale Obligations

Because advanced services will be offered primarily to residential and business end users, including ISPs, the Commission should require that all telephone exchange services predominantly offered to end users as advanced services be subject to resale under Section 251(c)(4), without regard to their classification by the Commission or ILEC as telephone exchange service or exchange access. Such a finding should encompass all advanced services, including those configured in the future, and not be limited to DSL services.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

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